

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-281-E**

In Re:

Shorthorn Solar, LLC; Whitetail Solar,
LLC, Rhubarb One LLC, Cotton Solar,
LLC, Rollins Solar, LLC; Juniper Solar,
LLC; Meslam Solar, LLC; Culpepper
Solar, LLC; Ashley Solar, LLC;
Jefferson Solar, LLC; Madison Solar,
LLC; Fairfield Solar, LLC; Bell Solar,
LLC; Webster Solar, LLC; B&K Solar
Farm, LLC; GEB Solar, LLC; Ross
Solar, LLC; Azalea Solar LLC; Cardinal
Solar LLC; Sunflower Solar LLC;
Cosmos Solar LLC; Zinnia Solar LLC;
Chester PV1, LLC; Ninety-Six PV1,
LLC; Newberry PV1, LLC; Bradley
PV1, LLC; Jonesville PV1, LLC; Ft.
Lawn PV1, LLC; and Mt. Croghan PV1,
LLC,

Complainants/Petitioners,

v.

**Duke Energy Carolinas, LLC and Duke
Energy Progress, LLC,**

Defendants/Respondents.

**DUKE ENERGY CAROLINAS, LLC'S
AND DUKE ENERGY PROGRESS,
LLC'S REPORT TO COMMISSION
REGARDING STATUS OF
DISCOVERY**

Pursuant to the Commission's May 1, 2019 Directive Order, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (together, "Duke" or the "Companies"), through counsel, hereby submit this Report Regarding Status of Discovery (the "Report") and state as follows:

The Companies are submitting this Report in response to the Commission's May 1, 2019 Directive Order which (1) denied Complainants' Petition for Reconsideration of Hearing Officer Order No. 2019-45-H, issued on April 3, 2019 (the "Order"), rejecting Complainants' request to

take the matter out of abeyance and set a hearing date; and (2) instructed the Parties to provide the Commission with their positions regarding the necessity of additional discovery time by May 16, 2019.

As the Commission is aware, discovery in this matter has been protracted. A complete history of the Companies' diligent attempts to elicit from Complainants information and documents that are responsive to the Companies' discovery requests and necessary to their defense of the claims against them in this matter is set forth in Duke Energy's Response in Opposition to Complainants' Petition for Reconsideration. Out of respect for the Commission's time and for reasons further explained below, the Companies will not repeat that history here. Since filing its Opposition brief on April 22, 2019, however, Duke Energy has continued its efforts to seek fulsome responses to its discovery requests from Complainants. On April 30, 2019, counsel for Duke Energy sent a letter to counsel for Complainants outlining several areas of continued deficiencies and requesting an in-person meeting between the parties on or before May 15, 2019 to facilitate a resolution. A copy of the April 30, 2019 letter is attached hereto as Exhibit A. To date, however, the Companies have not received any response from Complainants, in writing or otherwise, and accordingly believe that there are significant outstanding discovery issues to resolve between the parties.

On May 9, 2019, the South Carolina General Assembly passed H.3659, which was supported by the solar developers who brought this action on behalf of the solar qualifying facilities ("QF") Complainants and which has a direct impact on their claims against the Companies in this case. As a result of this new legislation, which the Governor is expected to sign on or before May 19, 2019, Duke Energy is now required to offer power purchase agreements with avoided cost rates fixed "for a duration of ten years" to small power producer QFs like solar QF

Complainants at issue here.¹ See H. 3659, 123rd Sess. (S.C.) (creating, in pertinent part, S.C. Code Ann. § 58-41-20(F)). As the Commission is aware, Complainants claims are premised upon allegations that the Companies refused to negotiate in good faith and to comply with their obligations to purchase the output of QFs under the Public Utilities Regulatory Policies Act of 1978 (“PURPA”) by offering avoided cost rates fixed over a term of *five* years.

In light of this new energy policy directive from the General Assembly requiring the Companies to offer solar QFs, including Complainants, ten-year contract terms, Duke believes the underlying issues in this action have been resolved. Assuming that Complainants withdraw the Complaint, the Companies see no need to pursue additional discovery.

Upon official enactment of this new legislation, the Companies plan to notify Complainants that they may seek to negotiate ten year purchase contracts with DEC and DEP. The Companies also commit to update the Hearing Officer assigned to this matter on or before June 3, 2019, as directed by Hearing Officer Directive 2019-45-H, regarding the status of these discussions as well as whether additional discovery is needed if Complainants have not taken action to withdraw the Complaint in light of the Companies’ commitment to ten-year term contracts as required by the new law.

Dated this 16th day of May, 2019.

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¹ H. 3659 requires such ten-year power purchase agreements until the electrical utility has executed interconnection agreements and power purchase agreements with qualifying small power production facilities located in South Carolina with an aggregate nameplate capacity equal to twenty percent of the previous five-year average of the electrical utility’s South Carolina retail peak load.

and

ROBINSON GRAY STEPP & LAFFITTE, LLC

/s/Frank R. Ellerbe, III

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Litigation + Business

Exhibit A

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April 30, 2019

VIA ELECTRONIC MAIL

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Re: Shorthorn Solar, et al. v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (Docket. No. 2017-281-E) - Complainants' Second Supplemental Response to Data Requests

Richard and Ben:

On behalf of our clients, Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (together, the "Companies" or "Duke"), this letter follows up on your most recent correspondence dated March 18, 2019, as well as the Hearing Officer Order No. 2019-45-H, issued on April 3, 2019 in the above-captioned proceeding (the "Order"). As you know, the Order provides the Companies and the Complainants 60 calendar days to resolve ongoing discovery disputes and for the Companies to pursue reasonable and responsive discovery from Complainants prior to reestablishing a procedural schedule and setting a new hearing date in this proceeding.

My letter of February 27, 2019, extensively details Complainants' protracted delays and piecemeal efforts over the past 15 months to respond to Duke's First Request for Production of Documents ("First Request"). Accordingly, I will not restate those concerns here. However, Duke's continuing review of Complainant's written responses to interrogatories and the limited documents produced by Complainants in response to a number of highly relevant inquiries in the First Request suggest that, absent further efforts by Complainants to earnestly work to resolve these deficiencies and to meet their discovery obligations to the best of their ability, Duke will be forced to pursue a further motion to compel discovery. By this letter, the Companies request an in-person meeting to be scheduled between the parties on or before Wednesday, May 15th, to address Complainants' continuing deficiencies in responding to the First Request.



Among other more specific issues, Duke proposes the Parties discuss the following general ongoing deficiencies during this meet and confer:

- 1) Your March 18, 2019, letter repeatedly affirms that Complainants recognize that they have an obligation to update discovery responses under Rule 26(e) of the South Carolina Rules of Civil Procedure and represents that Complainants “will update our discovery responses consistent with our obligation to do so . . .” However, since March 18, Duke has not received any supplemental responses nor any indication from Complainants that they plan to provide updated responses to Duke’s First Request by a date-certain. In light of the fact that the Complaint was filed over 18 months ago and Complainants initial, albeit deficient, responses to discovery were produced over 12 months ago, the Companies request Complainants immediately either provide updated responses or re-affirm their initial response to all Interrogatories and Requests for Production of Documents propounded in the First Request.
- 2) During the July 19, 2018 meeting between the parties to resolve ongoing discovery disputes, the Companies agreed to significantly narrow the scope of their discovery relating to Complainants’ development and financing of solar projects to include solar Facilities (as used in the Companies’ First Request) installed in South Carolina and North Carolina only (“SC/NC Facilities”). This agreement was memorialized in your email dated July 20, 2018 as Item #4. My letter of February 27, 2019, attempted to confirm the Complainants had produced all documents related to projections and/or reporting of the financial performance for each of the SC/NC Facilities as well as the Projects at Issue, including all such documents provided to investors of any kind. Your March 18, 2019 letter seems to suggest that Complainants have only selectively produced documents that are “indicative” of information responsive to this request. This implies that relevant and responsive documents have been inappropriately withheld from production. In the absence of a protective order issued by the Hearing Officer, Complainants are duty-bound to produce the entire universe of responsive documents in their possession. Duke, therefore, renews the requests in my letter of February 27, 2019, for Complainants to provide all relevant and responsive documents to the Companies’ First Request for the more limited SC/NC Facilities and Projects at Issue.
- 3) Complainants have purported to supplement their responses to the Company’s discovery requests by both letter and production of certain additional documents. However, many of the deficiencies the Company has noted pertain to Complainants’ response to various interrogatories in the First Request. Although Complainants have addressed some of those deficiencies in various letters to the Company over the past 12 months, no Complainant has properly supplemented any of its response in a formal



pleading document. The Company respectfully requests that each Complainant submit a formal supplemented response to the Company's First Request that encompasses the Complainant's full and complete response to each interrogatory that may appropriately be used as evidence in the upcoming proceeding. Answers to interrogatories must also be signed by the individual making them and subscribed by an appropriate verification, as required by S.C. Code. Ann. 103-833.B.

- 4) The Company has always maintained its right to seek further supplementation or to propound additional requests related to information sought in the Companies' First Request, as well as issues raised in the direct testimony of Complainants' six witnesses. Pursuant to the Hearing Officer's April 3, 2019 Order, the Companies expect to propound limited additional discovery and will expect timely and complete responses from Complainants prior to agreeing to establish a new procedural schedule and hearing date in this proceeding.
- 5) Last, the proposed meet and confer will give the parties an opportunity to discuss the implications of H.3659, currently pending at the General Assembly, on this case in the event it is passed during the current legislative session ending May 9, 2019.

At your earliest convenience, please contact me to discuss when you are available to meet and confer regarding these issues. If more convenient, I or my co-counsel would also be happy to meet with you in Raleigh and/or telephonically.

Yours truly,

Frank R. Ellerbe, III

FRE:tch

cc: Andrew M. Bateman, Counsel, Office of Regulatory Staff (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Rebecca J. Dulin, Associate General Counsel (via email)